

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1917.

No. 3109. **453**

SIDNEY BIEBER, APPELLANT,

vs.

FAYERDALE ORE & LUMBER CORPORATION, A
CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 23, 1917.

PRINTED AUGUST 2, 1917.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1917.

No. 3109.

SIDNEY BIEBER, APPELLANT,

vs.

FAYERDALE ORE & LUMBER CORPORATION, A
CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3109.

SIDNEY BIEBER, Appellant,

vs.

FAYERDALE ORE & LUMBER CORPORATION, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 59961.

FAYERDALE ORE & LUMBER CORPORATION, a Corporation, Plaintiff,

vs.

SIDNEY BIEBER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceeding had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 7, 1917.

In the Supreme Court of the District of Columbia.

Law. No. 59961.

FAYERDALE ORE & LUMBER CORPORATION, a Corporation, Plaintiff,

vs.

SIDNEY BIEBER, Defendant.

1. The plaintiff, Fayerdale Ore & Lumber Corporation, a Corporation, sues the defendant, Sidney Bieber, for that heretofore, to-wit,
1—3109a

on the 14th day of August, 1916, the Mount Airy & Eastern Railway Company, a Corporation duly organized and existing under the laws of the State of Virginia, executed and delivered to one T. W. Goodwin its four (4) certain promissory notes, all dated August 14, 1916, and payable to the said T. W. Goodwin or order, at the National Exchange Bank of Roanoke, at Roanoke, Virginia; one of the said notes being for the sum of Six Hundred Fifty Dollars (\$650), and payable four (4) months after date, and the remaining three of said notes being each for the sum of Five Hundred Dollars (\$500), and payable respectively eight, (8), twelve (12) and sixteen (16) months after date, and all of said notes bearing interest at the rate of six per cent (6%) per annum until paid. That it was provided in each and all of said notes that if the same were not paid at maturity and were collected by suit or attorney, the maker and endorsers agreed to pay, in addition to the amount of said notes, ten per cent (10%) collection or attorneys' fees, said amount being agreed

2 upon as a reasonable fee for collection. That the defendant, Sidney Bieber, endorsed each and all of the said notes and waived presentment, demand of payment, protest and notice thereof, before maturity and before the delivery of said notes to the said T. W. Goodwin. That payment of all of the said notes was secured by a certain chattel deed of trust, of even date with the said notes and conveying to Southwest Virginia Trust Company, of Roanoke, Virginia, as Trustee, a certain twenty-seven ton locomotive engine, manufactured by the Climax Company. That by the terms of the said deed of trust, which was duly executed by said Mount Airy & Eastern Railway Company, by Sidney Bieber, its president, and delivered to said Southwest Virginia Trust Company, Trustee, and with the knowledge and consent of the defendant, Sidney Bieber, who was then and there the president of said Railway Company, it was expressly provided that in the event default was made in the payment of either of said notes, in whole or in part, then the remainder of said notes with interest and other charges thereon, should immediately become due and payable; and the Trustee, upon the request of T. W. Goodwin, or the holder of any of said notes, should proceed to sell the said locomotive engine for cash, at a certain place and after certain advertisement therein specified, and from the proceeds should pay the costs of executing said trust and next apply said proceeds to the discharge of the said notes in the order of their maturity. That default was made in the payment of one of said notes, to-wit, the first note for the sum of Six Hundred Fifty Dollars (\$650), which was due December 14, 1916, wherefore, all of the said notes immediately became due and payable. Thereupon, the said Southwest Virginia Trust Company, Trustee, was requested to and

3 did proceed to sell, and did sell the said locomotive engine, after complying with all of the provisions and conditions of said deed of trust in reference to said sale, for the sum of Two Hundred Ten Dollars (\$210), and that upon applying the proceeds of said sale as in said deed of trust provided, the sum of One Hundred Seventy-three Dollars, Twenty-five Cents (\$173.25), was paid and applied as a credit upon said first-mentioned note for \$650.

That the said T. W. Goodwin endorsed each and all of the aforesaid notes to the plaintiff, for value, before maturity, without recourse against the said T. W. Goodwin.

But the said defendant has not, nor have any of the parties to the said notes, paid the same or any part thereof. And the plaintiff claims Two Thousand One Hundred Fifty Dollars (\$2,150), with interest thereon from August 14, 1916, at the rate of six per cent (6%) per annum, less a credit of \$173.25, as of January 16, 1917, together with collection or attorneys' fees equal to ten per cent (10%) thereof, besides costs.

2. The plaintiff further sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims \$2,150, with interest thereon from August 14, 1916, at the rate of six per cent (6%) per annum, less a credit of \$173.25, as of January 16, 1917, besides costs.

G. L. BAKER,
C. C. MILLER,
WM. WOLF SMITH,
Attorneys for Plaintiff.

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Affidavit of Plaintiff.

* * * * *

CITY OF ROANOKE,

State of Virginia, ss:

I, Waller R. Staples being duly sworn on oath say that I am President of Fayerdale Ore & Lumber Corporation, a corporation, the above named plaintiff, and make this affidavit in its behalf, being thereto duly authorized. That said plaintiff corporation has a good cause of action against the above named defendant, Sidney Bieber, upon the following grounds:

That heretofore, to-wit, on the 14th day of August, 1916, the Mount Airy & Eastern Railway Company, a corporation duly organized and existing under the laws of the State of Virginia, executed and delivered to one T. W. Goodwin its four (4) certain promissory notes, all dated August 14, 1916, and payable to the said T. W. Goodwin or order at the National Exchange Bank of Roanoke, at Roanoke, Virginia; one of said notes being for the sum of Six Hundred Fifty Dollars (\$650), and payable four (4) months after date, and the remaining three of said notes being each for the sum of Five Hundred Dollars (\$500), and payable respectively eight (8), twelve (12) and sixteen (16) months after date, and all of said notes bearing interest at the rate of six per cent (6%) per annum until paid. That it was provided in each and all of said notes that if the

same were not paid at maturity and were collected by suit or attorney, the maker and endorsers agreed to pay, in addition to the amount of said notes, ten per cent (10%) collection or attorneys' fees, said amount being agreed upon as a reasonable fee for collection. That the defendant, Sidney Bieber, endorsed each and all of the said notes and waived presentment, demand of payment, protest and notice thereof before maturity and before the delivery of said notes to the said T. W. Goodwin, and that the said T. W. Goodwin endorsed each and all of said notes, without recourse, to the plaintiff for value and before maturity. Copies of all of said notes are hereto attached and made a part hereof. That payment of all of the said notes was secured by a certain chattel deed of trust, of even date with the said notes and conveying to Southwest Virginia Trust Company, of Roanoke, Virginia, as Trustee, a certain twenty-seven ton locomotive engine, manufactured by the Climax Company. That by the terms of the said deed of trust, which was duly executed by said Mount Airy & Eastern Railway Company, by Sidney Bieber, its president, and delivered to said Southwest Virginia Trust Company, Trustee, and with the knowledge and consent of the defendant, Sidney Bieber, who was then and there the president of said Railway Company, it was expressly provided that in the event default was made in the payment of either of said notes, in whole or in part, then the remainder of said notes with interest and other charges thereon, should immediately become due and payable; and the Trustee, upon the request of T. W. Goodwin, or the holder of any of said notes, should proceed to sell the said locomotive engine for cash, at a certain place and after certain advertisement therein specified, and from the proceeds should pay the costs of executing said trust and next apply said proceeds to the discharge of the said notes in the order of their maturity. That default was made in the payment of one of said notes, to-wit, the first note for the sum of Six Hundred Fifty Dollars (\$650), which was due December 14, 1916, wherefore, all of the said notes immediately became due and payable. Thereupon, the said Southwest Virginia Trust Company, Trustee, was requested to and did proceed to sell, and did sell the said locomotive engine, after complying with all of the provisions and conditions of said deed of trust in reference to said sale, for the sum of Two Hundred Ten Dollars (\$210), and that upon applying the proceeds of said sale as in said deed of trust provided, the sum of One Hundred Seventy-three Dollars, Twenty-five Cents (\$173.25), was paid and applied as a credit upon said first-mentioned note for \$650.

That the defendant, Sidney Bieber, has not nor have any of the parties to the said notes, paid the same, or any of them, or any part thereof; and that there is now justly due and owing to the plaintiff from the defendant the sum of Two Thousand One Hundred Fifty Dollars (\$2,150), with interest thereon from August 14, 1916, less a credit of One Hundred Seventy-three Dollars, Twenty-five Cents (\$173.25), as of January 16th, 1917, together with ten per cent (10%) collection or attorneys' fees, exclusive of all set-offs and just

grounds of defense, according to the particulars of demand hereto annexed.

WALLER R. STAPLES.

Subscribed and sworn to before me this 5th day of February, A. D. 1917.

MARY O'CALLAGHAN,
*Notary Public in and for the
City of Roanoke, Virginia.*

My commission expires Jan. 23, 1920.

7 *Particulars of Demand.*

* * * * *

Copies of Notes.

"ROANOKE, VA., Aug. 14th, 1916. \$650.

Four months after date for value received we promise to pay to T. W. Goodwin, or order, without offset, negotiable and payable at The National Exchange Bank of Roanoke, at Roanoke, Va., Six Hundred Fifty & 00/100 Dollars.

Homestead and all other exemptions waived by the maker and each endorser. 6% interest.

If this note is not paid at maturity and is collected by suit or attorney, the maker and endorsers hereof agree to pay in addition to the amount of this note, ten per cent (10%) collection or attorneys' fees, said amount being agreed upon as a reasonable fee for collection. The maker and endorsers hereof hereby waive presentment, demand of payment, protest and notice thereof, of this note.

MOUNT AIRY AND EASTERN RAIL-
WAY CO.,

(Signed) By SIDNEY BIEBER, *President.*

Address.

Attest:

(Signed) A. W. MACHEN, *Sec.*

Endorsements.

(Signed) Sidney Bieber, Without recourse on (Signed) T. W. Goodwin.

For deposit only to the credit of Fayerdale Ore & Lumber Corporation."

"ROANOKE, VA., Aug. 14th, 1916. \$500.00.

Eight months after date, for value received, we promise to pay to T. W. Goodwin, or order, without offset, negotiable and payable at

The National Exchange Bank of Roanoke, at Roanoke, Va., Five Hundred & 00/100 Dollars.

Homestead and all other exemptions waived by the maker and each endorser. 6% interest.

If this note is not paid at maturity and is collected by suit or attorney, the maker and endorsers hereof agree to pay in addition to the amount of this note, ten per cent (10%) collection or attorneys' fees, said amount being agreed upon as a reasonable fee for collection. The maker and endorsers hereof hereby waive presentment, demand of payment, protest and notice thereof, of this note.

MOUNT AIRY AND EASTERN RAIL-
WAY CO.,

(Signed) By SIDNEY BIEBER, *President*.

Address.

Attest:

(Signed) A. W. MACHEN, *Sec.*

8

Endorsements.

(Signed) Sidney Bieber, Without recourse on (Signed) T. W. Goodwin."

"ROANOKE, VA., Aug. 14th, 1916. \$500.00.

Twelve months after date, for value received we promise to pay to T. W. Goodwin, or order, without offset, negotiable and payable at The National Exchange Bank of Roanoke, at Roanoke, Va., Five Hundred & 00/100 Dollars.

Homestead and all other exemptions waived by the maker and each endorser. 6% interest.

If this note is not paid at maturity and is collected by suit or attorney, the maker and endorsers hereof agree to pay in addition to the amount of this note, ten per cent (10%) collection or attorneys' fees, said amount being agreed upon as a reasonable fee for collection. The maker and endorsers hereof hereby waive presentment, demand of payment, protest and notice thereof, of this note.

MOUNT AIRY AND EASTERN RAIL-
WAY COMPANY,

(Signed) By SIDNEY BIEBER, *President*.

Address.

Attest:

(Signed) A. W. MACHEN, *Sec.*

Endorsements.

(Signed) Sidney Bieber, Without recourse on (Signed) T. W. Goodwin."

"ROANOKE, VA., Aug. 14th, 1916. \$500.00.

Sixteen months after date, for value received, we promise to pay to T. W. Goodwin, or order, without offset, negotiable and payable at The National Exchange Bank of Roanoke, at Roanoke, Va., Five Hundred & 00/100 Dollars.

Homestead and all other exemptions waived by the maker and each endorser. 6% interest.

If this note is not paid at maturity and is collected by suit or attorney, the maker and endorsers hereof agree to pay in addition to the amount of this note, ten per cent (10%) collection or attorneys' fees, said amount being agreed upon as a reasonable fee for collection. The maker and endorsers hereof hereby waive presentment, demand of payment, protest and notice thereof, of this note.

MOUNT AIRY AND EASTERN RAIL-
WAY CO.,

(Signed) By SIDNEY BIEBER, *President*.

Address.

Attest:

(Signed) A. W. MACHEN, *Sec.*

Endorsements.

(Signed) Sidney Bieber, Without recourse on (Signed) T. W. Goodwin."

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Pleas, etc.

Filed March 15, 1917.

* * * * *

Now comes the defendant, and for pleas to the declaration in the above entitled cause says:

1. That he did not undertake and promise in manner and form as in said declaration alleged.

2. That he is not indebted in manner and form as in said declaration alleged.

H. J. PACK,
LEVI H. DAVID,
Attorneys for Defendant.

Affidavit of Defense.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

I, Sidney Bieber, after being first duly sworn, say as follows:

That I am the person named as defendant in the above entitled suit, in which the Fayerdale Ore and Lumber Corporation, a cor-

poration, is named as plaintiff; that I have read my pleas, hereto annexed, which are hereby referred to and made part hereof. Said pleas are true. I have a good defense to the whole of the plaintiff's claim in this suit, which defense is as follows:

10 That at the time of the execution and delivery of the notes sued on in this cause, I was the President of the Mt. Airy and Eastern Railway Company, a corporation, and from then up to date hereof have continued so to be; that on to wit: August 14, 1916, the said Mt. Airy and Eastern Railway Company purchased from the plaintiff the certain twenty-seven ton locomotive engine, manufactured by the climax company, mentioned and referred to in the plaintiff's declaration and affidavit, at and for the sum of \$2,650, at which time the Mt. Airy and Eastern Railway Company paid to the plaintiff the sum of \$500.00, in cash, on account of said purchase price, and for the balance thereof, namely, the sum of \$2,150, the said Mt. Airy and Eastern Railway Company executed and delivered the four certain notes mentioned and described in plaintiff's said suit, unto one T. W. Goodwin, who, as I am informed and believe, and expect to be able to prove at the trial hereof, was then, and still is, an officer or agent of the aforesaid plaintiff, and who acted in said transaction for and in behalf of the plaintiff, and further, that the said T. W. Goodwin was named as nominal payee in the said notes at the request of the plaintiff, and that said Goodwin endorsed said notes over, without recourse, to his principal, the said plaintiff; that I am further informed and believe, and expect to be able to prove at the trial hereof, that at the time of the said transaction and the sale of the said engine, the said plaintiff, was informed by the said Railway Company, by its officials, of which said Goodwin had knowledge, that the said locomotive engine was being purchased by the Mt. Airy and Eastern Railway Company for use in connection with its operations at or near Mr. Airy, North Carolina, to be used by said Railway Company for the purpose of hauling and moving certain cars containing heavy timber and logs, and other materials at or near Mt. Airy, North Carolina, in connection with the business operations of the said Mt. Airy and Eastern Railway Company, all of which was then explained to the plaintiff, by its duly authorized agent; that I expect to prove at the trial hereof, that at the time of the sale and delivery of the aforesaid engine to the said Railway Company, the plaintiff represented to the said Railway Company, and to this affiant, that the said locomotive engine was then in first class condition and that the same would perform the work of the said Railway Company, as aforesaid. On the contrary, affiant expects to prove at the trial hereof, the fact that the said locomotive engine, at the time of the delivery of the same to the said Railway Company, was not in first class condition, but it was in a defective condition, and that it was not capable of doing the work of the said Railway Company, as aforesaid, as it was represented by the plaintiff it would do; that the said locomotive engine, at the time of the said delivery thereof by it was not capable of moving or hauling timber, lumber and other materials of the said Railway Company, at or near Mt. Airy, North Carolina, where said

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Railway Company was carrying on its operations, as the plaintiff represented it would do; that thereupon it became and was essential for the said Railway Company to and it did expend large sums of money, in all approximately \$1,000, in making necessary repairs on the said locomotive engine in the effort to make said engine do the aforesaid work required of it by the said Railway Company, which said work the plaintiff represented to the said Railway Company the said engine would do without the expenditure of any money for any repairs. That neither the defendant nor the Mt. Airy and Eastern

12 Railway Company has been reimbursed in any sum whatever, either for the original \$500.00 paid on account of the purchase price or the sum of approximately \$1,000 expended by the Mt. Airy and Eastern Railway Company for the aforesaid repairs made to the said engine which were made on said engine solely by reason of the defective condition in which it was delivered to said Railway Company by the plaintiff. That at the time of the purchase of the said locomotive engine of the said Railway Company, and at the time of the execution of the aforesaid notes, I endorsed the said notes by reason of the aforesaid representations of the plaintiff that the said engine was in first class condition, and would perform the work to be required of it by the said Railway Company, which said work was explained to the plaintiff at that time.

At the time of the aforesaid sale and delivery of the aforesaid engine to the said Railway Company, said Railway Company executed a chattel deed of trust, or mortgage, dated August 14, 1916, to secure the aforesaid four notes aggregating \$2,150, in which the Southwest Virginia Trust Company, of Roanoke, Virginia, was named trustee; that subsequently to the non-payment of the first of the aforesaid notes, I am informed and believe, and expect to prove at the trial hereof, that the said plaintiff, by its agent, took possession of the said engine and that the same is now in its custody.

SIDNEY BIEBER.

Subscribed and sworn to before me this 14th day of March, 1917.

[SEAL.]

HENRY A. BAKER,
Notary Public.

13 *Motion for Judgment under 73d Rule.*

Filed April 3, 1917.

* * * * *

Now comes the plaintiff by its attorneys, and moves the Court for judgment for the want of a sufficient affidavit of defense upon the following grounds:

1. That the defendant's affidavit does not support his pleas.
2. That the matter of defense alleged is one of set-off, recoupment or counterclaim on the part of the Mt. Airy & Eastern Railway Company, which was the maker of the notes sued upon in this

case, but not of this defendant, and cannot be set up by the defendant when sued alone as endorser of the said notes.

G. L. BAKER,
C. C. MILLER,
Attorneys for Plaintiff.

Messrs. H. J. Pack and Levi H. David, Attorneys for Defendant:

Please take notice that the above motion will be for hearing on the 6th day of April, 1917, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

G. L. BAKER,
C. C. MILLER,
Attorneys for Plaintiff.

14 Supreme Court of the District of Columbia.

MONDAY, May 28, 1917.

Session resumed pursuant to adjournment, Mr. Chief Justice Covington presiding.

* * * * *

This cause coming on to be heard upon the motion of plaintiff filed herein, for judgment under the seventy third Rule of this Court for want of a sufficient affidavit of defense, it is considered that said motion be, and it is hereby granted.

Therefore it is considered that the plaintiff herein recover against the defendant the sum of Twenty one hundred and fifty dollars (\$2,150.00) with interest thereon from August 14, 1916, at the rate of six (6) per cent per annum, less a credit of one hundred and seventy three and 25/100 dollars (\$173.25) as of January 16, 1917, with ten (10) per cent as collection or Attorneys' fees, being the money payable by said defendant to plaintiff by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

15 *Opinion of Court.*

Filed May 29, 1917.

* * * * *

In this case there is a motion by the plaintiff for judgment under Rule 73.

The suit is against the defendant as endorser upon certain promissory notes given by the Mount Airey and Eastern Railway Company to the plaintiff to pay for a locomotive purchased by the Railway Company from the plaintiff. The notes (four) are now all overdue, hence this suit.

The affidavit of merit is an appropriate one under Rule 73.

The defendant has pleaded 'the general issue' pleas, and his affidavit of defense sets up the fact that he was, and is, president of the railway company, and that his endorsement of the notes described in the plaintiff's declaration was secured upon the representation that the locomotive sold by the plaintiff to the railway company was "in first class condition and that the same would perform the work of said railway company." The affidavit then goes on to allege that the locomotive was not in first class condition and was not capable of doing the work of the railway company, but that approximately \$1,000 had to be expended upon the same in making necessary repairs to it in order to have it in condition to do the work required of it by the railway company.

A careful consideration of this affidavit will show that it does not present a case where there has been a total failure of consideration for the contract of sale of the locomotive between the plaintiff and the railway company. It must be remembered that this is
 16 not a suit upon the contract, but simply a suit upon the notes given in payment for the locomotive delivered by the plaintiff to the railway company under the contract. If the railway company were being sued on the notes, unquestionably the amount of the expenditures made in order to put the locomotive in the condition it was warranted to be in, or any other appropriate damages to the railway company growing out of the contract, might be set up by it as a defense by way of recoupment. That is not the case here, however. The defendant is merely an endorser upon the notes, and it can make no difference if his endorsement was made because the warranty was given to him as president of the railway company.

Bieber, as an individual, has sustained no injury by the breach of warranty if such breach in fact exists. The mere fact that he is president of the railway company can make no difference. That company is a distinct entity; an artificial person with which his official relation as an officer is quite distinct from his position as an individual.

The case of *Osborne & Company vs. Bryce*, 23 Fed. Rep. 171, seems conclusive of this question. Upon a state of facts almost identical with those here disclosed, the Court held that a mere counterclaim growing out of a breach of warranty is not available to a guarantor or surety, whether he be an endorser for value or merely an accommodation endorser.

Motion for judgment granted.

J. HARRY COVINGTON,
Chief Justice.

17

Order for Appeal and Citation.

Filed June 2, 1917.

* * * * *

The Clerk of said Court will enter an appeal from the judgment herein, on behalf of the defendant, to the Court of Appeals of the D. C. & issue citation to the plaintiff.

LEVI H. DAVID,
Attorney for Def't.

18 In the Supreme Court of the District of Columbia.

In Equity.

At Law. No. 59961.

FAYERDALE ORE & LUMBER CORP'N, a Corp'n,

vs.

SIDNEY BIEBER.

The President of the United States to Fayerdale Ore & Lumber Corporation, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the judgment of the Supreme Court of the District of Columbia, on the 28 day of May, 1917, wherein Sidney Bieber is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 2d day of June in the year of our Lord one thousand nine hundred and seventeen.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By C. B. COFLIN, *Ass't Cl'k*.

Service of the above Citation accepted this 2nd day of June 19—.
C. C. MILLER,
Attorney for Appellee.

[Endorsed:] 6. 8. No. 59961. Law. Fayerdale Ore & Lumber Corp'n, vs. Bieber. Citation Issued June 2, 1917. Service accepted by pl't'ff's atty's. Clerk please file.

19 Supreme Court of the District of Columbia.

THURSDAY, June 7, 1917.

Session resumed pursuant to adjournment, Mr. Chief Justice Covington presiding.

* * * * *

This cause coming on to be heard upon the motion of defendant filed herein, to fix the amount of the bond for costs on appeal noted in this cause, it is ordered that the penalty of said bond be, and it is hereby fixed in the sum of one hundred dollars (\$100).

Memorandum.

June 13, 1917.—Bond on appeal approved and filed.

Assignment of Errors.

Filed June 26, 1917.

* * * * *

Now comes the defendant, Sidney Bieber, by his attorneys, and says that the trial court committed error as follows:

1. In holding that the plaintiff's affidavit of merit was sufficient to entitle it to a summary judgment under Rule 73.

2. In holding that the defendant's affidavit did not support his pleas.

3. In awarding judgment in favor of the plaintiff for the want of a sufficient affidavit of defense.

4. In holding that the matter of defense alleged is one of set-off, recoupment, or counterclaim on the part of the Mt. Airy & Eastern Railway Company, the maker of the notes sued upon, but not of the defendant, and could not be set up by the defendant in this case.

5. In not holding that the affidavit of the defendant was sufficient to entitle the defendant to a trial by jury.

6. In rendering a judgment in favor of the plaintiff.

7. And in other respects apparent upon the face of the record.

LEVI H. DAVID,
H. J. PACK,
Attorneys for Defendant.

Service of foregoing acknowledged this 25th day of June, 1917.

G. L. BAKER,
C. C. MILLER,
Attorneys for Plaintiff.

Designation of Record on Appeal.

Filed June 26, 1917.

* * * * *

Mr. John R. Young, Clerk.

DEAR SIR: Please include in the transcript of the record on appeal of the above entitled case, to the Court of Appeals, the following papers:

- 21 1. Declaration.
2. Defendant's pleas and affidavit of defense.
3. Plaintiff's motion for judgment.
4. Opinion of the court.
5. Judgment for plaintiff.

6. Appeal noted by defendant, and order for citation to plaintiff.
7. Citation, service accepted by plaintiff.
8. Memo.: Order fixing bond for \$100.00, for costs on appeal.
9. Bond approved and filed.
10. Assignment of errors.
11. This precipe.

LEVI H. DAVID,
H. J. PACK,
Attorneys for Defendant.

Service of the foregoing is hereby acknowledged this 25th day of June, 1917.

G. L. BAKER,
C. C. MILLER,
Attorneys for Plaintiff.

Plaintiff's Designation of Record on Appeal.

Filed June 26, 1917.

* * * * *

22 The Clerk will please include in the transcript of the record on appeal of the above entitled cause, the plaintiff's affidavit under the 73d Rule.

G. L. BAKER,
C. C. MILLER,
Attorneys for Plaintiff.

23 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59961 at Law, wherein Fayerdale Ore & Lumber Corporation, a corporation, is Plaintiff and Sidney Bieber is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of July, 1917.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3109. Sidney Bieber, appellant, vs. Fayerdale Ore & Lumber Corporation, a corporation. Court of Appeals, District of Columbia. Filed Jul- 23, 1917. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 1 - 1917

Henry W. Hodges
Deputy Clerk

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.
OCTOBER TERM, 1917.

No. 3109.

SIDNEY BIEBER, APPELLANT,
vs.
FAYERDALE ORE & LUMBER CORPORATION, A
CORPORATION, APPELLEE.

BRIEF FOR APPELLANT.

LEVI H. DAVID,
Attorney for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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vs.

FAYERDALE ORE & LUMBER CORPORATION, A
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BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal by Sidney Bieber, defendant in the court below, from a judgment rendered against him by the Supreme Court of the District, for the alleged want of a sufficient affidavit of defense in this action under the provisions of the seventy-third rule of practice of that court (Rec., p. 10).

The action in which the appellee, the Fayerdale Ore & Lumber Corporation is plaintiff, is based upon four promissory notes of which the appellant and the Mount Airy and Eastern Railway Company, a corporation, are joint makers. The railway company however, is not a party defendant, the appellant Bieber being sued alone (Rec., pp. 1-7).

The affidavit of claim (Rec., pp. 3-5) sets out in substance that on the fourteenth day of August, 1916, the Mount Airy and Eastern Railway Company executed

and delivered to T. W. Goodwin its four promissory notes all bearing that date, and payable in four, eight, twelve, and sixteen months after date; the first note being for six hundred and fifty (\$650) dollars, and the remaining three being for five hundred (\$500) dollars each. These notes bear 6 per cent interest and provide for a 10 per cent attorney's fee if collected by suit (Rec., pp. 5-7).

The notes were secured by a chattel trust upon a twenty-seven ton locomotive engine (Rec., p. 4). This trust provided that if default was made in payment of any of the notes all of said notes should become due and payable and that in such event the trustee upon request, should sell the locomotive for cash and apply the proceeds to the discharge of the notes in the order of their maturity. These notes secured by the trust were indorsed by Goodwin the payee to the plaintiff without recourse. That default was made in the payment of the note first due, and that thereupon the trustee under the chattel trust securing the notes sold the locomotive engine for two hundred and ten (\$210) dollars and applied one hundred and seventy-three and 25/100 (\$173.25) dollars of this sum for the discharge of the \$650 note. The affidavit of claim also sets out that Sidney Bieber, the sole defendant against whom the suit was brought, was president of the Mount Airy and Eastern Railway Company, and that he endorsed each of the notes in suit, before their delivery to the payee (Rec., p. 4).

Under these conditions this suit was brought and \$2,150 with interest from August 14, 1916, less \$173, together with 10 per cent attorney's fee was claimed (Rec., p. 3). Copies of the notes are attached to the affidavit and made part of the same (Rec., pp. 4-7).

Reference to these notes (Rec., pp. 5-7) shows that they are joint in form, reading "we promise to pay," and that they have the signature of the Mount Airy and Eastern

Railway Company by Sidney Bieber, president, upon the face and the individual signature of Sidney Bieber upon the back of each. As above stated, this signature upon the back was affixed before the delivery of the notes (Rec., p. 4). The affidavit of claim studiously refrains from stating what the consideration for the notes was.

The affidavit of defense (Rec., pp. 7-9) states, in substance, that these notes in suit were given in part payment for the identical locomotive mentioned in the plaintiff's affidavit, and that \$500 in cash in addition to the notes was paid therefor to the plaintiff, the Fayerdale Ore & Lumber Corporation, who was the actual vendor of the engine; that T. W. Goodwin, the payee of the notes, was and is an officer and agent of the plaintiff, and that he acted in this transaction for and on its behalf; and that at the request of the plaintiff, he became the nominal payee of the notes and then indorsed them without recourse to his principal; that the object of the purchase of this locomotive by the Mount Airy and Eastern Railway Company as was made known to the plaintiff and to Goodwin at the time of its purchase, was its use in the heavy transportation business of the railway company; that the plaintiff represented to the railway company and to the defendant, who was president of the railway company at the time of the sale and delivery of the engine to the railway company, that said engine was then in first-class condition and would perform the said work of the railway company. That by reason of these representations made to the railway company and *to the defendant, the defendant became a party to the notes.*

The affidavit of defense further states that notwithstanding the representations of the plaintiff regarding the engine, this engine, at the time of its delivery to the railway company was not in first-class condition, but on the contrary was in a defective condition, and it was not

capable of doing the work of the railway company as the plaintiff had represented it would do; that in an effort to make this engine do the work which the plaintiff had represented it would do, it became and was necessary for the railway company to spend, and it did spend, approximately \$1,000 in making necessary repairs on the engine, although the plaintiff had represented that the engine would do this work without the expenditure of any money for any repairs; that no one has reimbursed either the railway company or the defendant for the \$500 cash paid on account of the engine, or for the \$1,000 spent in repairing the defective condition of the engine; that subsequently, when the railway company and the defendant did not pay the first note, the plaintiff through its agent took possession of the engine and now has the same. The pleas accompanying the affidavit of defense were the general issues of *non assumpsit* and *nil debit* (Rec., p. 7).

Motion was made for judgment under the seventy-third rule for want of a sufficient affidavit of defense (Rec., p. 9). The trial court granted this motion and rendered judgment against the appellant (Rec., p. 10), upon the theory that he was an indorser upon these notes, and that as such he was not entitled to the benefit of the defense of "a mere counter claim" which the trial court held the affidavit of defense set up (Rec., p. 11). From this judgment the present appeal is taken.

Assignment of Errors.

1. In holding that the plaintiff's affidavit of merit was sufficient to entitle it to a summary judgment under Rule 73.
2. In holding that the defendant's affidavit did not support his pleas.
3. In awarding judgment in favor of the plaintiff for the want of a sufficient affidavit of defense.

4. In holding that the matter of defense alleged is one of set-off, recoupment, or counterclaim on the part of the Mount Airy and Eastern Railway Company, the maker of the notes sued upon, but not of the defendant, and could not be set up by the defendant in this case.

5. In not holding that the affidavit of the defendant was sufficient to entitle the defendant to a trial by jury.

6. In rendering a judgment in favor of the plaintiff.

7. And in other respects apparent upon the face of the record.

ARGUMENT.

I.

The first assignment of error is that the court erred "in holding that the plaintiff's affidavit of merit was sufficient to entitle it to a summary judgment under the seventy-third rule."

A reading of the declaration, and the affidavit of claim, and a consideration of the annexed particulars of demand which are made a part of the affidavit of claim, show beyond all question, that this action is based exclusively upon the four promissory notes which constitute the particulars of demand. These notes are each complete in themselves. They do not purport to be secured by mortgage or chattel trust. They make no reference to any other paper as limiting their terms or altering their conditions, and they each bear a fixed, and definite date of maturity and time for payment. The defendant (appellant) in his individual capacity was not a party to the chattel trust.

This action was begun on the seventeenth day of February, 1917. At that time only the first of these notes was due. The affidavit of claim, dated February 5, 1917, discloses the fact that three of these notes were not ac-

according to their own provisions, due at the time of suit. How then could judgment be given under this affidavit on the three notes not then due?

True, it is said that there was a collateral and separate agreement between the railway company and a trustee (Rec., p. 2) in the form of a trust deed covering a chattel given to secure the payment of these notes, by the terms of which these notes should be deemed as all due and payable on default being made in the payment of any one. But that contract is not in suit, nor is it in any way involved in this proceeding. That contract was with the trustee not with the holder of the notes, so far as this record shows. The object of that contract was the enforcement of a proceeding *in rem* against a certain chattel upon the happening of a certain contingency. This action is not based upon that trust agreement but is a common law action upon notes which by their own terms are not yet due. How then can the plaintiff alter the obligations and terms of these written contracts in the suit by merely referring in his declaration and affidavit of claim to a collateral agreement not sued upon?

It is believed that to this extent the first assignment of error is well taken, and that as to the three \$500 notes not due at the time of the institution of the suit, the affidavit of claim does not state a then existing cause of action, and that consequently judgment upon these three notes could not be given against the defendant under the seventy-third rule. This contention is amply supported by authority.

“Where notes are secured by a mortgage or deed of trust, which provides that all shall become due and payable on default in the payment of any one of them when it becomes due, or on default of the payment of interest, such default will render all due for the purpose of foreclosing the mortgage, but according to the better opinion it does not

render them due for other purposes before the time fixed by their terms, as for the purpose of a personal action or judgment on such of the notes as are not due by their terms."

7 Cyclopedic of Law Procedure, page 860, title "Commercial Paper."

"But where a trust deed securing several notes contains a provision making all due in default of anyone, and this provision is not in the notes, it will only take effect so far as regards proceeds of sale under the trust deed."

Randolph on Commercial Paper, V. 1, Paragraph 114, page 184.

White *vs.* Miller, 52 Minn., 367; 19 L. R. A., 673.

McClelland *vs.* Bishop, 42 Ohio State Rep., 113, 122.

Lawson *vs.* Cundiff, 81 Mo. App., 169, 177.

McMillan *vs.* Grayston, 83 Mo. App., 425, 432.

Morgan *vs.* Martien, 32 Mo., 438, 444.

Mason *vs.* Barnard, 36 Mo., 384, 391.

Westminster College *vs.* Peirsol, 161 Mo., 270, 286.

Owing *vs.* McKenzie, 133 Mo., 323; 40 L. R. A., 154, 158.

Mallory *vs.* West Shore Hudson River R. R. Co., 35 N. Y. Superior Court Rep., 174.

It should be further observed that in this case there was a conflict between the terms of the chattel mortgage and of the notes themselves. The mortgage made all the notes immediately payable on default in the payment of anyone. The notes, however, purported to be payable

only at fixed dates. In such a case the terms of the notes and not of the mortgage must prevail.

Railway Co. *vs.* Sprague, 103 U. S., 756, 761.

Rothschild *vs.* Ry. Co., 84 Hun, (91 N. Y. Sup. Ct. Rep.), 103, 110, affirmed 164 N. Y., 594.

II.

The second assignment of error is that the court erred "in holding that the defendant's affidavit did not support his pleas."

The pleas in this case are the general issues of *non assumpsit* and *nil debit*. The affidavit of defense sets up a defense because of failure of consideration, according to the contention of the defendant. The plaintiff contends, however, that the defense is one of recoupment, and this contention was upheld by the trial court (Rec., p. 11).

For the purpose of this assignment of error it is immaterial which view is accepted, because both a failure of consideration and a defense by way of recoupment can be shown under the general issue.

"The common law did not require the want of failure of consideration to be specially plead, but it might be given in evidence under the general issue."

Randolph on Commercial Paper, V. 1, Paragraph 564, page 917.

The law regarding recoupment is too well settled to require citation of authority, but see—

Lee *vs.* Rutledge, 51 Md., 311.

III.

The third, fourth, fifth, sixth, and seventh assignment of errors involve the general question as to the sufficiency of the plaintiff's affidavit of defense.

The first point to be remembered in determining these

assigned errors is that the allegations of the defendant's affidavit for the purposes of this proceeding, must be taken as true.

Strauss vs. Hensey, 7th D. C. App., 289, 294.

St. Clair vs. Conlon, 12 D. C. App., 161, 165.

Myers vs. Davis, 13 D. C. App., 361, 367.

In the second place, it must be noted that the plaintiff, according to the allegations of the affidavit of defense (Rec., p. 8) having obtained the execution of the notes in suit through its agent Goodwin, acting for its benefit and in its behalf, is not a *bona fide* holder; and that this suit between the plaintiff and Bieber is nothing more or less than a suit between parties to the original contract represented by the notes, and that the plaintiff is subject to any defense that Bieber may have had against Goodwin.

Manny vs. Glendenning, 15 Wis., 55, 59.

Harpham vs. Haynes, 30 Ill., 404, 410.

Bearing these points in mind, the following defenses are open to the defendant, and it is believed the affidavit of defense amply sets forth facts entitling the defendant to a trial by jury upon the questions arising under them.

1. The contention of the defendant is that while, by the very act of writing his name upon the back of these notes, he necessarily became a physical "endorser" of these notes, he in no sense became a legal "indorser," but was and is a joint maker of these notes with the Mount Airy and Eastern Railway Company.

The affidavit of claim states (Rec., p. 4) "that the defendant Sidney Bieber, endorsed each and all of the said notes and waived presentment, demand of payment, protest and notice thereof before maturity and before the delivery of said notes to the said T. W. Goodwin." Prior to the adoption of the Negotiable Instrument Law,

which now forms chapter 46 of the code of the District of Columbia, there can be no question that Bieber, under these conditions, would have been a joint maker of these notes.

Hutchinson *vs.* Brown, 19 D. C., (VIII Mackey), 136.,

Randle *vs.* Davis Coal and Coke Co., 15 D. C. App., 357.

Good *vs.* Martin, 95 U. S., 90.

Randolph on Commercial Paper, V. 2, Paragraph 832, page 1287.

By section 1367 of the D. C. Code, the law has been altered to this extent:

“Sec. 1367. Irregular indorsement. A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.”

While it is true that these notes are Virginia contracts made and payable in Virginia, there is nothing in the record to show what the laws of Virginia are, governing an indorser of this character, and we must, therefore, under the recognized rule, assume that the laws of Virginia are the same as those in this district—which is in point of fact true. See Virginia Code, section 2841, paragraph 63; both the District of Columbia and Virginia having adopted the general Negotiable Instrument Law.

There can be no doubt that it was the intention of the Negotiable Instrument Act, in altering this well established rule, making an irregular indorser before the delivery of a note a joint maker, so as to give him instead the position of an indorser, to benefit and not to prejudice such a party. By declaring him to be an indorser

it was the intention of the act to give him the benefit of the doubt, and entitle him to presentment, protest and notice. But where this position of indorser is to his detriment and not in his favor, the reason for the alteration of the rule fails, and it should take but little to reinstate him in his former status of joint maker, especially upon a motion under the seventy-third rule.

Looking to the notes, we find that they read "we promise to pay," which is the form of a joint note, and these words are certainly "proper words" to "clearly indicate" that Bieber intended to be bound in some other capacity than that of "indorser." As Bieber and the railway company are the only parties whose names appear on the notes the word "we" can only refer to them, and therefore they are joint makers. The proper way for a corporation to sign a note is in the singular person "I." Though it is admitted that the word "we" is sometimes employed in the execution of corporate contracts. However that fact does not lessen the force of the word "we" as used in this note; at best it only creates an ambiguity which should be determined by evidence as to the intention of the parties in executing the notes, and which entitles the appellant to a trial by jury on this question.

That the real relation of an irregular indorser to the note he signs and the extent of his liability under it can always be shown by parol and is a proper question for the determination of the jury, see—

Randolph on Commercial Paper, V. 2, Paragraph 841, page 1300.

Bright *vs.* Carpenter, 9 Ohio, 139, 142.

Owings *vs.* Baker, 54 Md., 82, 86.

Baker *vs.* Robinson, 63 North Carolina, 191.

Strong *vs.* Riker, 16 Vt., 554, 557.

Sturtevant *vs.* Randall, 53 Me., 149, 155.

The affidavit of defense shows that the contract was made directly with appellant (Rec., p. 8); that he waived all rights which would attach to an indorser (Rec., p. 4); and that he became a party to the notes by reason of the original consideration (Rec., p. 9). All of these facts indicate that his position on the note was that of a joint maker. It is of course necessarily true as stated in his affidavit of defense that he "endorsed" the notes when he placed his name upon the back of them. But that there is a definite distinction between the words "endorse" and "indorse," see the use of these words as explained in the Standard Dictionary and the 1916 Edition of Webster's Dictionary. The term embodying legal liability, as used in the code, is "indorse," while "endorse" means the physical act of writing on the back of a paper. Bieber only says that he "endorsed" the notes.

As on a motion of this kind every intendment must be decided in favor of the right of trial by jury, and as the affidavit clearly sets up facts which show Bieber's relation to the notes to be that of a joint maker, there can be no doubt that the other allegations of the affidavit of defense state a defense to the plaintiff's claim sufficient to entitle the defendant to a trial.

The defendant's affidavit states that the sum of \$500 was paid in cash on the purchase price for the engine; that the notes in suit were given for the balance of the purchase price and in consideration of the representations of the vendor, the present plaintiff, that the engine was in a certain condition and would perform certain work; that the engine at the time of the delivery was not in the condition represented and would not perform the work for which it was purchased and which the vendor represented it would perform; that the sum of \$1,000 was expended in an attempt to make good the deficiencies covered by the plaintiff's false representations; and that subsequently the engine for whose purchase the notes

in the suit were given was retaken into the possession of the plaintiff and was held by the plaintiff at the time of the suit on the notes. *All this amounts to a statement of total failure of consideration for the notes.* That a maker of a note can set up failure of consideration as a defense to a suit upon the same between the original parties, especially where the notes are given for the purchase price of a defective article falsely represented to be perfect, see—

Randolph on Commercial Paper, V. I, par. 538, page 868.

Starr vs. Torrey, 22 N. J. Law, 190, 193.

Wheelock vs. Berkeley, 138 Ill., 153, 157.

Shepherd vs. Temple, 3 N. H., 455.

Perley vs. Balch, 23 Pick. (40 Mass.), 283, 287.

Nations vs. Thomas, 25 Tex. (Supplement), 221, 223.

Huntington vs. Lombard, 22 Wash., 202, 207.

Barr vs. Baker, 9 Mo., 840, 844.

Rugland vs. Thompson, 48 Minn., 539, 543.

2. But whether appellant occupied the relation to these notes of a joint maker or of an indorser, it is believed that his defense is equally good.

In the first place, "an accommodation indorser is, in general, entitled to all defenses available to a surety at suit of holders with notice of the character of the paper, including subrogation to the rights of the principal debtor."

Randolph on Commercial Paper, V. 1, Paragraph 476, page 772.

This being the case, he has the following defenses open to him even if he is in the position of indorser, as is claimed by the plaintiff:

(a) According to the affidavit of defense "at the time of the sale and delivery of the aforesaid engine to the rail-

way company, the plaintiff represented . . . to this affiant, that said locomotive engine was then in first-class condition and that the same would perform the work of the said railway company as aforesaid." The affidavit then sets up the failure of the engine to measure up to this warranty. It then concludes:

"I endorsed the said notes by reason of the aforesaid representations of the plaintiff that the said engine was in first-class condition, at that time."

As before stated, this allegation of the affidavit of defense must be accepted as true.

Here then was a direct contract with the defendant by reason of which his signature to the notes was obtained by the plaintiff. Can the plaintiff disregard its part of the contract and still hold the defendant to his merely because the defendant happened to be an indorser and not a maker; or in other words, because his name was on the back and not on the face of the notes? That a breach of an assurance given to an indorser upon the faith of which he became a party to the notes, is a good defense to a suit upon the notes against the indorser by an original party to the contract, see—

Jeffries *vs.* Lamb, 73 Ind., 202, 205, 206.

Bushey *vs.* Reynolds, 31 Ark., 657.

Gunnis, Barrett & Co. *vs.* Weighley, 114 Pa. State Rep., 191, 195.

(b) It has been shown that this affidavit of defense sets up a failure of consideration as to the maker of these notes. We have also seen that an accommodation indorser has all the rights of a surety. That if there is a failure of consideration as to the maker, the surety on commercial paper can not be held.

Adams *vs.* Cuny, 15 La. Ann., 485.

So that even had there been no independent consideration moving to Bieber and by which his indorsement was obtained, and had he merely indorsed for the accommodation of the railway company, in this suit he could still take advantage of a failure of consideration between the vendor plaintiff and the railway company.

(c) That the expenditure of the \$500 cash payment, and the \$1,000 in repairs by the maker of the note, being in excess of the \$650 note in suit, which was the only one due at the time of the institution of this suit, would constitute a complete failure of consideration for that note.

Miller vs. Gibbs, 29 Ind., 228.

Mills vs. Rosenbaum, 103 Ind., 152.

Applegarth vs. Robertson, 65 Md., 493, 496.

(d) Again, it is shown by the affidavit of claim that this engine for which the notes were given proved to be only of the value of \$210, when retaken by the vendor (Rec., p. 4). It is also shown by the affidavit of defense that \$500 in cash was paid to the vendor at the time of the purchase of the engine, which payment was not returned to the railway company or the defendant, but is still retained by the plaintiff. The \$500 paid would therefore represent the full value of the engine. That notes representing the balance of the purchase money, where a part payment made at the time of purchase in reality entirely covers the value of the thing sold under false representations, are open to the defense of a total failure of consideration.

Still vs. Snow, 66 Vt., 277, 278.

(e) Moreover, it is shown by the affidavit of defense that the engine sold by the plaintiff to the railway company was not reasonably suited to the uses for which it was intended, and the uses for which it was bought were

made known to the vendor at the time of the purchase. This would constitute a failure of consideration between the original parties to the notes given for the purchase price.

Smith vs. Hightower, 76 Ga., 629.

Consequently it is a defense open to Bieber in whatever capacity he is sued.

(f) The only consideration for these notes was the engine. The affidavit of defense sets up that the plaintiff had taken possession of the engine and that the same is now in its custody. This statement of the affidavit of defense must be taken as true. That any act of the plaintiff which would amount to a conversion of the subject-matter of the consideration of the notes would cause a failure of consideration for the notes, needs no argument. Resumption of possession of the engine under the conditions of this case amounted to a conversion.

Howery vs. Hoover, 97 Iowa, 581.

That the allegation used in the affidavit of defense in alleging resumption and retention of possession of this engine is sufficient, see—

Codington vs. Standard Bank, 40 D. C. App. Cas., 409.

The foregoing considerations would seem amply sufficient to dispose of the defendant's liability on all of the notes in suit upon a motion for summary judgment. But, this argument becomes doubly strong when it is remembered that only one note was properly in suit, the other three not being as yet due, and that the \$500 part payment and the \$1,000 paid for repairs would more than balance the amount of this one note due.

Conclusion.

The trial court based his decision adverse to the defendant, upon the authority of the case of *Osborne & Co. vs. Bryce*, 23 Federal Rep., 171. He considered the facts of that case to be "almost identical with those here disclosed," and that that case was therefore "conclusive." A careful consideration of that case, however, will disclose that it is decided upon an entirely different principle from that involved in the present case. Here, according to Bieber's affidavit of defense, he was induced to become a party to these notes because of certain representations *made directly to him by the plaintiff*, and he was therefore a party to the consideration for the notes and entitled to insist that the representations which constituted the consideration be made good. In the *Osborn* case, however, the breach complained of was the non-performance of the "plaintiff's engagement to the makers of the notes," and the warranty, under which it was held that the defendant could not defend, was "made between the plaintiff and the purchaser of the engine." In other words, the defendants, the indorsers of the notes in that case, were not parties to the original consideration. The distinction between the two cases is obvious.

But it is earnestly submitted that this is certainly a case where substantial justice demands the right of trial by jury. Here the plaintiff received \$500 in cash; it resumed possession of the engine according to the statement of the affidavit of defense which must be taken as true; and has therefore additionally profited by reason of the \$1,000 repairs on the same; it also now has judgment of approximately \$2,000 against the appellant. In other words, it still has the engine and has an additional profit of about \$3,500 by reason of this transaction. Against this the defendant has the liability of a \$2,000 judgment!

Again, much doubt is cast upon the fairness of the plaintiff's action in this case, by the statements of its own affidavit in connection with those of the defendant, by which it is shown that when the railroad company bought this engine from the vendor it brought \$500 in cash and \$2,150 in notes; a total of \$2,650. But when the alleged sale is made by the trustee only four months afterwards, the same engine with the additional \$1,000 worth of repairs on it, only brings \$210. This would seem a ridiculous price for a twenty-seven ton locomotive engine. At the current price of iron this engine was worth more than \$210 as old material.

It is respectfully submitted that the judgment appealed from should be reversed, and that the appellant should have his trial by jury in this cause.

Respectfully submitted,

LEVI H. DAVID,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 27 1917

Henry W. Hodges
IN THE *Blacks*

Court of Appeals, District of Columbia.

OCTOBER TERM, 1917.

No. 3109.

453

SIDNEY BIEBER, APPELLANT,

vs.

**FAYERDALE ORE & LUMBER CORPORATION, A
CORPORATION, APPELLEE.**

BRIEF FOR APPELLEE.

**GIBBS L. BAKER,
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IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1917.

No. 3109.

SIDNEY BIEBER, APPELLANT,

vs.

FAYERDALE ORE & LUMBER CORPORATION, A
CORPORATION, APPELLEE.

BRIEF FOR APPELLEE.

Statement of the Case.

The statement of facts contained in the appellant's brief is substantially correct, except as to the statement (p. 1) that the appellant and the Mount Airy and Eastern Railway Company are *joint makers* of the notes involved. That the railway company was the maker of said notes, and the defendant an endorser, appears from the declaration (Rec., p. 2), the affidavits of both parties (Rec., pp. 3-4, 8-9), and copies

of the notes themselves (Rec., pp. 5-7). There is absolutely nothing in the record to support the statement that the appellant was a joint maker, and such a claim is made only in the appellant's brief.

ARGUMENT.

I.

The first assignment of error is that "the plaintiff's affidavit of merit was insufficient to entitle it to a judgment," because, as appellant claims, it shows that all the notes sued upon were not due at the time of suit.

The suit was brought upon the notes, as modified by the terms of the chattel deed of trust securing them, which was "of even date with the said notes," and "by the terms of which * * * with the knowledge and consent of the defendant Bieber, it was expressly provided that in the event default was made in the payment of either of said notes, in whole or in part, then the remainder of said notes, with interest and other charges thereon, should immediately become due and payable." It is further alleged "that default was made in the payment of one of said notes, * * * wherefore all of said notes immediately became due and payable" (Plaintiff's affidavit, Rec., p. 4).

Appellant alleges that the deed of trust was a collateral agreement and was "not sued upon," but the essential provisions affecting the notes were expressly set forth in both the declaration and the affidavit of the plaintiff (Rec., pp. 2 and 4), and it was not necessary to incorporate the whole instrument in the pleadings.

The mortgage having been executed at the same time as the notes, and with the knowledge and consent of the defendant Bieber (Rec., p. 4), they should be considered as one transaction.

Moline Plow Co. *vs.* Webb, 141 U. S., 616; 35 L. Ed.,
879, 882.

A contemporaneous agreement must be construed as part of the instrument, at least, as between the original parties and all others who take the negotiable instrument with notice of the agreement.

Tiedeman on Com. Paper, par. 42.

8 Corpus Juris, par. 330, says:

“Where a note is executed at the same time as a mortgage given to secure its payment they are to be read and construed together as parts of the same instrument, and hence the terms of the note may be modified by the mortgage. Especially is this true where the note refers directly to the mortgage or *vice versa*.”

There was no “conflict” between the terms of the mortgage and the notes, because they contemplated different contingencies. The dates provided in the notes contemplated that the indebtedness should be paid in instalments at specified times; the accelerating terms of the mortgage contemplated and provided for only a failure to pay the indebtedness in the instalments and at the times specified.

In *Railway Co. vs. Sprague*, 103 U. S., 753, 761, there was a contradiction in terms between bonds and a mortgage securing them as to whether a six months’ default in the *payment of interest* should make the principal become due, or whether such default must continue for six months after *interest was demanded*. The bonds provided for a *demand*, while the mortgage did not. By the terms of the bonds the principal was not to be due, in ordinary course, for thirty years. It was not suggested that the provisions regarding default would not make the principal become due before the date of maturity of the bonds, but the sole question was which of two inconsistent provisions contemplating the *same matter*—the procedure in case of default—should prevail, and it was held that the default provisions of the bond should prevail. Of course there is no conflict or inconsistency be-

tween the *ordinary* due dates of notes secured by a mortgage and the provisions *in case of default* in the mortgage, for they do not refer to or contemplate the same matter. It is admitted that there is some conflict in the cases upon the question whether the effect of an acceleration clause in the mortgage will be limited to foreclosure for the full amount of the note, or whether it will mature the debt itself, but a full examination of authorities shows that the better opinion is that it will mature the note itself.

Note, 46 L. R. A. (N. S.), 475, 480, says:

“Upon the weight of authority a clause only in the mortgage providing that the debt shall become due upon a contingency therein set forth, will mature the note, although it be not due by its terms.”

This seems to be the rule in the Federal courts.

Brewer *vs.* Penn. Mut. L. Ins. Co., 36 C. C. A., 289;
94 Fed., 347.

Wheeler Co. *vs.* Howard, 28 Fed., 741, opinion by
Judge Brewer.

Gregory *vs.* Marks, 8 Biss., 44 Fed. Cas., No. 5,802.

And, against the Minnesota, Ohio and Missouri cases cited by appellant, it is supported by the following cases from 16 States, and from England and Canada:

Chambers *vs.* Marks, 93 Ala., 412.

Hennessey *vs.* Gore, 35 Ill. App., 594.

Clayton *vs.* Whittaker, 68 Iowa, 412.

First Nat. Bank *vs.* Peck, 8 Kan., 660.

Spesard *vs.* Spesard, 75 Kan., 87.

Kansas L. & T. Co. *vs.* Gill, 2 Kan. App., 488.

Piersol *vs.* Shelley, 3 Kan. App., 386.

Evans *vs.* Baker, 5 Kan. App., 68.

Grand Island Sav. & L. Asso. *vs.* Moore, 40 Neb., 686.

San Antonio Real Est. Bldg. & L. Asso. *vs.* Stewart,
94 Tex., 441.

- Pfeuffer vs. Wilderman* (Tex.), 1 White & W. Civ. Cas. Ct. Ap., Par. 1169.
Schoonmaker vs. Taylor, 14 Wis., 314.
Lewis vs. Lewis, 58 Kan., 563.
Douthitt vs. Farrell, 60 Kan., 195.
Leonard vs. Tyler, 60 Cal., 299.
Beal vs. Stevens, 72 Cal., 451.
Buchanan vs. Berkshire L. Ins. Co., 96 Ind., 510.
Moore vs. Sargent, 112 Ind., 484.
Pope vs. Hooper, 6 Neb., 178.
Lantry vs. French, 33 Neb., 524.
Germond vs. Hermosa Ice Co., 9 S. D., 387.
Green vs. Frick, 25 S. D., 342.
Williams vs. Douglas, 47 La. Ann., 1277.
Banzer vs. Richter, 123 N. Y. Supp., 678.
Fox vs. Gray, 105 Iowa, 433.
Park vs. Cook, 3 Bush (Ky.), 168.
Consterdine vs. Moore, 65 Neb., 292.
Duvall vs. Bank, 9 Gill & J. (Md.), 31, 49.
Manitoba Mtg. & Investment Co. vs. Daly, 10 Manitoba L. Rep., 425.
McFadden vs. Brandon, 8 Ont. L. Rep., 610.
Reeves vs. Butcher, 2 Q. B., 509.
Lovell vs. Goss (Colo.), 101 Pac., 72.

Mallory vs. West Shore, etc., R. Co., 35 N. Y. Super. Ct., 174, the New York case cited by appellant, involved bonds which were part of a \$2,000,000 issue. The court said that the covenant in the mortgage in case of default "not having been made with the plaintiff, it must appear, to enable him to bring an action upon it, that it was made to benefit him. The language often used by the cases on this subject is, that it must appear that the contract was made for his benefit." It then considered in detail the language and provisions of the mortgage, and came to the conclusion that the accele-

rating default provision was not intended to be for the benefit of any particular bondholders, but for the collective benefit of all, and that the interests of other bondholders might be injured if any were allowed to obtain judgments before the mortgage trustees had foreclosed and made distribution. Hence the plaintiff was not allowed to proceed.

In *Duvall vs. Bank*, 9 Gill & J., 31, 49, the maker of certain notes had given a mortgage to his endorsers to indemnify them, and in it there was a covenant to pay the amount for which the endorsers (mortgagees) might become indebted, on or before a certain date. The notes became due by their terms *before* the date mentioned in the mortgage, and the endorsers were called upon to pay them. The court held that the effect of the covenant in the mortgage was not only to prevent foreclosure of the mortgage before the date mentioned, but "to prevent all recovery against Lewis Duvall (the maker) of the amount of these responsibilities, until the time limited, in case the endorsers or either of them were compelled to pay them." While in this case the provisions of the mortgage operated to *retard* instead of *accelerating* liability under the notes, the rule that the time of payment of the notes was controlled by the mortgage securing them was in issue and was applied by the Maryland court.

Green vs. Frick, 25 S. D., 342, holds that a provision in a mortgage securing notes that, upon default in the payment of principal or interest "the whole sum, both principal and interest, shall at once become due and collectable," had the effect upon default of making the entire indebtedness due and payable and of starting limitations running against the notes from the date of default.

And *Van Arsdale Co. vs. Martin*, 81 Kan., 499, says that while such a provision is primarily for the benefit of the mortgagee, it can be turned to the benefit of the mortgagor and will start the statute of limitations running in his favor upon default.

To the same effect are:

Manitoba Mortg. & Invest. Co. *vs.* Daly, 10 Manitoba L. Rep., 425.

San Antonio, etc., Asso. *vs.* Stewart, 94 Tex., 441.

McFadden *vs.* Brandon, 8 Ont. L. Rep., 610.

Spesard *vs.* Spesard (Kan.), 88 Pac., 576.

Snyder *vs.* Miller, 71 Kan., 410; 69 L. R. A., 250; 114 Am. St. Rep., 489.

Reeves *vs.* Butcher, 2 Q. B., 509.

Lovell *vs.* Goss (Colo.), 101 Pac., 72.

The rule that the time of payment of the notes is accelerated appears, therefore, to be established in the Federal courts, and by the decided weight of authority in the States. And it certainly seems more compatible with reason and justice, in cases between parties having full knowledge of the circumstances, that the holder of notes whose security is entirely insufficient to pay the debt, should be allowed to proceed for its collection upon default, and not be compelled to sue "piecemeal" or to wait for months, or perhaps years, for his remedy against a debtor who has already broken his contract, and who may dispose of his property or leave the jurisdiction before the last instalment is due.

This contention of the appellant affects only three of the four notes involved in this case.

II.

Appellant's second assignment of error, that the court erred, "in holding that the defendant's affidavit did not support his pleas," requires no extended argument. Appellant's claim that either failure of consideration or a defense by way of recoupment may be shown under the general issue may be conceded. It is sufficient to say that the recoupment must be for damages suffered by the *defendant*, and not solely by another party.

III.

Touching the preliminary points made by the appellant, we admit that the allegations of defendant's affidavit, *as to their fair intent and meaning*, must be taken as true, but they must be read in connection with the affidavit of the plaintiff, and its allegations, when not clearly denied or contradicted by defendant's affidavit, are also to be taken as true. We concede that, according to the allegations of defendant's affidavit, this suit is one between the original parties to the notes.

1. As to the "contention" that the defendant, while a physical "endorser," as admitted without qualification in his affidavit (Rec., p. 9), is "in no sense a legal endorser," but was a joint maker of the notes, his affidavit does not so state, and there are no *facts* whatever alleged upon which to base such a contention.

Although quoting section 1367 of the D. C. Code, as follows:

"Sec. 1367. Irregular Indorsement.—A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity,"

counsel for appellant argues that the word "we" on the face of the note before the signature of the corporation maker, complies with the Code requirement that "he (the endorser) must clearly indicate by appropriate words his intention to be bound in some other capacity." While admitting that the word "we" is "sometimes employed in the execution of corporate contracts," he says that "at best it only creates an ambiguity which should be determined by evidence as to the

intention of the parties, and which entitles the appellant to a trial by jury on this question."

In the first place, there is no claim or allegation in defendant's affidavit that it was agreed between the parties that he should be a joint maker, or even that *he intended* to sign as maker and not as endorser. There is absolutely nothing in the record on this point, and it is only made by counsel in his brief. There is, therefore, no foundation for introducing parol evidence on the subject, even if it were admissible.

But such evidence could not be received in any event.

In *Randle vs. Davis Coal Co.*, 15 App. D. C., 357 (also cited by appellant), the defendant Randle appealed from a judgment under the 73d rule, in a suit against himself and the Capital Railway Company. As in this case, Randle was president of the railway company and had endorsed its note to plaintiff, as he claimed, "without any consideration moving from the said railway company or to said plaintiff," alleging that the coal company had made a certain agreement, which it had failed to keep. Speaking of the effect of his endorsement, this court quoted from *Martin vs. Cole*, 104 U. S., 30, 37:

"The contract created by the endorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by law, much less an inchoate or imperfect contract. It is an express contract and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser signed upon the back of a negotiable instrument, conveys and expresses his

meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full."

The court then adds:

"It is well settled by the decisions of the Supreme Court of the United States, and by all well considered decisions of other courts, that extrinsic evidence is not available to contradict or vary the legal effect of such blank indorsement, in the absence of fraud in procuring such indorsement. *Abrey vs. Crux*, 5 L. R. C. P., 37; Benjamin's Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, etc., Art. 56, p. 63; *Metzerott vs. Ward*, 10 App. D. C., 514, and the authorities there cited; and also cases cited with approval in *Martin vs. Cole*, *supra*; *Forsythe vs. Kimball*, 91 U. S., 291."

In *Metzerott vs. Ward*, *supra*, the defendant, Metzerott, who had signed his name on the face of a note, attempted to show in defense that he intended to be and was in fact an endorser, instead of a joint maker. In the language of the court, speaking through Mr. Chief Justice Alvey, the fact was that—

"the signatures all appear to the note as though of joint and several makers, and the effort now made is to *rescue one of the parties from liability* (italics ours) by showing, by extrinsic evidence, a state of facts to destroy the natural and legal import and effect of the note; that is to say, by changing a joint and several note apparently made by four persons, to a joint and several note made by three persons, with another person bound only conditionally as indorser, notwithstanding his name appears on the face of the paper as maker, with nothing to indicate that he intended to be bound as indorser only. And the question is, whether, according to any well-settled principle, in the absence of fraud, this can be done. We are of opinion it cannot."

After an examination of authorities, the opinion quotes the paragraph above set forth from *Martin vs. Cole*, 104 U. S., 30, and concludes by saying:

“And so it is, and with greater force, to be concluded, that, when a party signed his name on a note, professing on its face to have been signed in the character of maker, the note must be taken as expressing his intention and obligation, and the party so signing the note can no more relieve himself, by the introduction of parol evidence, from liability as maker, than a party who indorses his name in blank on the note can by such means qualify or avoid his liability as indorser. Both are bound by an express contract in writing, and where there is no fraud or ambiguity requiring explanation, neither can introduce parol evidence to change, vary, qualify, or contradict the legal import of the contract evidenced by his signature. Many authorities might be cited in support of the principle just stated, but we deem it unnecessary.”

See also *Dixon vs. Clayville*, 44 Md., 573, 577, where the court refused to consider evidence as to the intention or effect of an endorsement on the back of a note.

Finally the Code expressly provides, section 1321, par. 6:

“Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.”

We think that there can be no doubt that, however the word may be spelled, the defendant was a legal indorser of the notes, and, the contract not having been made for his benefit, an accommodation party, under section 1333 of the Code.

2. As an endorser or guarantor of the notes, the defendant cannot avail himself of the defense set up in his affidavit. That defense is not one of mere *failure of consideration*, but

is a *counter-claim* for breach of warranty, and belongs to the maker of the notes and purchaser of the chattel.

Osborne *vs.* Bryce, 23 Fed., 171.

Joyce *vs.* Cockerill, 92 Fed., 838.

Gillespie *vs.* Torrance, 25 N. Y., 306.

The leading case on this subject is that of Gillespie *vs.* Torrance, 25 N. Y., 306, in which a note had been given by the purchaser of certain timber and endorsed for accommodation by the defendant.

When sued on the note, he set up a breach of warranty because of quality inferior to that certified by the inspector of the plaintiff. After citing many cases, including Withers *vs.* Green, 9 How., 213, it was held to be optional with the maker of the note (and purchaser of goods) to set up the facts and claim for damages either by way of defense or to resort to a cross-action or another action to recover them. But that the defendant endorser could not avail himself of the breach of warranty as a defense, either total or partial, because:

“1. Such damages constitute a counter-claim and not a mere failure of consideration, and not being due to the defendant cannot be claimed by him (Lemon *vs.* Trull, 13 How., par. 248; Dows *vs.* Congdon, 16 *Id.*, 576, note).

“2. Van Pelt has a right of election, whether the damages shall be claimed by way of recoupment in a suit on the note or reserved for a cross-action. The defendant cannot make this election for him.

“3. If the defendant has a right to set up the counter-claim and have it allowed in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but \$100 instead of \$1,800.

“4. Supposing the other notes given for the timber to have been endorsed by different persons for the accommodation of Van Pelt (the maker) and all to

remain unpaid, each of the endorsers would have the same rights as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?

"5. In the case which was shown on the trial there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt (the maker) for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great and possibly to a greater extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected."

Note to above case, in 82 Am. Dec., 359, says:

"If the defendant is a mere surety, having no interest in the contract, he cannot avail himself of any matter of defense which could form the subject of a separate action by his principal, since he could not bind that principal by his election to employ it as a defense."

Osborne *vs.* Bryce, 23 Fed., 171, cited by the court below in his opinion (Rec., p. 11), involved right of an endorser on notes given for mowing machines to set up as defense the fact that the machines had been warranted by the manufacturer (plaintiff) to be well built and capable of doing certain work, and that there had been a breach of that warranty. *Held*, that this could not be done.

"The breach of warranty, if shown, would not give the *defendants* a right of action against the *plaintiff*, nor necessarily cause them any damage. The makers of the notes might have a right of action against the plaintiff for damages sustained by them in consequence of the breach or they might set off or recoup their damages in a suit against them upon the notes. There is no averment in the answer that Sproat & Co. or the defendant Bryce have sustained

any injury on account of the alleged failure of the machines to answer the requirements of the warranty. Until some injury, actual or threatened, has resulted to the defendants from some claim made against them by the makers of the notes, how can it be said that they can avail themselves of the defense here interposed, in an action wherein their liability to the plaintiff as guarantors of the notes is sought to be enforced? The makers of the notes can, I think, alone elect to set up the defense of breach of warranty given on the sale of the machines, and they are not parties to this action. The defense is one not arising out of the defendant's contract of guaranty. The liability of the plaintiff, if any, resulting from a breach of their warranty, is one wholly in favor of the purchasers of the machines."

In this case, moreover, it was alleged in the answer that the defendant did not endorse or guarantee the notes "at the request of the maker, or for his benefit," but at the request of the plaintiff, and that his (defendant's) guaranty

"was made and based upon this warranty * * * and upon no other consideration, and that the guaranty would not have been given had not the plaintiff so warranted the machine sold."

The court cited and approved *Gillespie vs. Torrance*, *supra*; *Lasher vs. Williamson*, 55 N. Y., 619; *Henry vs. Daley*, 17 Hun., 210; *Himer vs. Newton*, 30 Wis., 640, and said further:

"The defenses here interposed do not arise upon a failure of the consideration of the contract on which the plaintiff's action is founded. They are rather to be regarded as the *setting off of distinct causes of action*, one against the other. The non-performance of the plaintiff's engagement to the makers of the notes is not to be regarded as a failure of consideration, but as an independent cause of action which the makers of the notes, and they only may assert. It is in their election to determine whether it shall be used defensively, or whether they will bring their own

actions for the damages, or whether they will forego their claims altogether. The defendants have no control over them in this respect, and cannot borrow, or avail themselves of their right. *Lasher vs. Williamson, supra.*"

Joyce vs. Cockerill, 92 Fed., 838, was a case decided by the Circuit Court of Appeals, in the Sixth Circuit, before Judges Taft, Lurton, and Severens.

It was an action on a promissory note on which defendant was surety, and which was given by the maker as part of the purchase price of the assets of an insolvent corporation. There were set up two defenses, to both of which a demurrer was sustained, and judgment rendered against the defendant. One of the defenses was "failure of consideration," in that part of the assets purchased, consisting of certain notes, had not been delivered by the receiver who sold them, although there had been a decree vesting the title to them in the purchaser. It was held that this was not a mere "failure of consideration" of the original contract, though there might exist against the plaintiff a liability to account to the defendant's principal for the notes in question or their proceeds. The court, in an opinion by Judge Lurton, said:

"That is a right of action which belongs to the principals and cannot be claimed or asserted by their surety. It is certainly not a right of set-off belonging to the surety, for only mutual claims are the subject of set-off. That it might be asserted as a counter-claim by the principals, if sued, may be conceded. Even then they would be under no obligation to set it up by way of recoupment or counter-claim; for, if the facts do not constitute a failure of consideration, they might reserve their claim, and bring a separate action. * * *

"But, upon general principles, the liability of the defendant in error to account for the notes in question, cannot be relied upon as either a set-off or counter-claim—First, because if it be set up and allowed here, it must bar any future action by the principal makers of the note; and, second, the answer shows

another note of like amount outstanding upon which a different person is liable to be sued as surety. * * * In *Gillespie vs. Torrance*, 25 N. Y., 306, the suit was, as here, against the surety upon a note, and the defense was a failure of consideration. The note was given for the price of timber sold to the principal maker of the note. The timber was in a raft, and the quantity and quality was estimated upon certificates of a surveyor. The defense was that there was a gross mistake as to quantity, and a breach of warranty in that respect as well as in quality. The court held that the defense of failure of consideration was not made out and that the surety could not avail himself of the breach of warranty as to quantity or quality. The court said that, though there seemed 'a strong equity in favor of the defendant to have the note cancelled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty' it was an equity in which Van Pelt was interested to even a greater extent than the defendant and could not be disposed of without having him before the court. In *Lasher vs. Williamson*, 55 N. Y., 619, the action was against the sureties of a lessee who sought to defend by showing that the plaintiff as part of the contract between himself and their principal lessee had agreed 'to furnish to him during the period of the lease a certain quantity of property to be stored upon the leased premises at an agreed price' and that he breached this agreement. The court said:

"The breach of that promise gave (the lessee) a cause of action against the plaintiff but this cause of action in favor of Gibbs (the lessee and principal maker of the bond) cannot be available to the sureties. It belongs to Gibbs and not to them. * * * The non-performance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively or whether he will bring his own action for the

damages or whether he will forego his claim altogether. The defendants have no control over him in this respect and cannot borrow and avail themselves of his rights.'

"It is proper to observe that neither set-off nor counter-claim were set forth as distinct defenses in the answer. Without admitting that either defense could be made under the defense of failure of consideration, we have preferred to treat the defenses as properly pleaded. There was no error in sustaining the demurrer to the answer, and the judgment will be affirmed."

It may be conceded that where there has been a total *failure of consideration* between vendor and purchaser the vendor cannot enforce a purchase-money note against either maker or endorser. But in this case the consideration (the engine) was delivered to the purchaser, and there is no allegation that it was absolutely worthless, but only that there was a breach of a warranty alleged to have been given as to its condition and fitness to do certain work. No rescission of the contract is alleged, but the purchaser kept it and repaired it, nor is there even any allegation that after the making of the repairs the engine was not in perfect condition and capable of doing the particular work desired of it.

Therefore the cases cited by the appellant do not support his contention.

In *Jeffries vs. Lamb*, 73 Ind., 202, defendants were both sureties on a note. They alleged an express agreement by plaintiff to surrender for cancellation a prior note and chattel mortgage of their principal, so that he could *indemnify them* by a first mortgage on the *same security*, and stated that it was only upon this condition that they became sureties on the note; that plaintiff failed to surrender said note and mortgage, so that they were prevented from obtaining their indemnity from the principal, and therefore there had been "a breach of condition and a failure of consideration." This was plainly a loss and failure of consideration *to the sureties*,

and not a mere alleged partial failure of consideration, affecting only the *principal*, as in the case at bar.

Bushey vs. Reynolds, 31 Ark., 657: Defense was that note was executed upon sole consideration that plaintiff would advance to the principal (maker) \$2,000 in money, the face value of the note, but that he did not do it. Here was no allegation of breach of warranty or defects in the consideration, but of an absolute and total want and failure of consideration from the outset.

Adams vs. Curry, 15 La. Ann., 485: Suit was on joint note of husband and wife, the consideration being alleged to have accrued to the wife, and "*plaintiff's* proof of consideration was found insufficient to charge Sarah J. Curry as a married woman." It was said that the trial judge "might have pronounced upon the consideration as to A. H. Curry (the husband), as the proof had been introduced by the plaintiff, but he gave judgment of nonsuit" as to both. A new trial was ordered as to the husband. As the surety (husband) was held not discharged by the failure to show consideration as to the principal (the wife), the case is really in favor of appellee, though there is an unconsidered dictum which might, if unexplained, be construed otherwise.

Miller vs. Gibbs, 29 Ind., 228, is absolutely not in point. The failure of consideration was wholly between the payee and maker of a note, who were the only parties involved. The same is the case with *Applegarth vs. Robertson*, 65 Md., 493, and *Smith vs. Hightower*, 76 Ga., 629.

Mills vs. Rosenbaum, 103 Ind., 152, not only fails to aid the appellant, but it supports the appellee. It was a suit by transferee of note against the *maker*, and the defense was that it had been given for a horse, which was warranted free from disease, but *had* a disease and subsequently became blind, thereby losing \$100 in value. There was no surety or endorser involved. The court said:

"Some confusion has arisen by treating defenses of this character as failure of consideration. They are,

on the contrary, of the very essence of a counter-claim, the statutory definition of which is 'any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages.' When the facts averred in an answer present a counter-claim, the fact that it was not formally pleaded as such can make no difference. It will be judged by what it is, and not by what it is called. The facts set up in the answer are connected with the cause of action. They might have been the subject of an independent action in favor of the defendants, and they did tend to reduce the plaintiff's claim."

The parts of the opinion quoted above elucidate the appellee's proposition, and the court will be aided by remembering always that the defense in our case (as in this) is not a mere "failure of consideration," either total or partial, and solely a matter of defense, but is "of the very essence of a counter-claim;" "that the fact that it was not formally pleaded as such can make no difference;" and that it "might have been the subject of an independent action" in favor of the *railway company*, the *purchaser* of the engine, whose rights cannot be borrowed by the defendant herein.

As to the appellant's remaining contention that the statements in his affidavit as to the plaintiff's having "taken possession" of the engine and that it is now "in its custody," sufficiently allege a conversion and therefore a failure of consideration, brief answer will be made.

The case of *Howery vs. Hoover*, 97 Iowa, 581, cited in support, was one where the provisions of the mortgage *were not observed*, but the mortgagee in defiance of them took, held, and used the property as his own. Of course that amounted to a conversion. The same would be true in this case *if the provisions of the chattel trust were not carried out*, and if the plaintiff took the property *from the railway company, and for itself*. But that was not the case, and there are no allegations, even upon information and belief, that it

was. If the provisions of the trust were not strictly carried out it was very easy for the appellant to so allege (especially upon information and belief), and he should have done so, but he has not. His statement that he believes that the plaintiff "took possession" of the engine, and that "the same is in its custody," is equally founded upon fact if the plaintiff bought in the engine at the sale under the chattel trust, after the admitted nonpayment of the first note (Rec., p. 9), and thereupon, as it had a right to do, "took possession" of the same and had it "in its custody."

Against the defendant's brief and unexplained allegation is the absolute, clear, and unqualified statement in the plaintiff's affidavit (Rec., p. 4), that upon default—

"the said Southwest Virginia Trust Company, trustee, was requested to and did proceed to sell, and did sell the said locomotive engine, after complying with all of the provisions and conditions of said deed of trust in reference to said sale, for the sum of two hundred ten dollars (\$210), and that upon applying the proceeds of said sale as in said deed of trust provided, the sum of one hundred seventy-three dollars, twenty-five cents (\$173.25) was paid and applied as a credit upon said first-mentioned note for \$650."

If an affidavit of defense does not controvert or deny material statements of fact contained in plaintiff's affidavit, such statements must be taken as substantially correct.

Bryan vs. Harr, 21 App. D. C., 190.

While great strictness should not be required of a defendant in his affidavit, and an affidavit will be held sufficient which shows a defense set forth in good faith, yet it cannot be permitted that the defendant should evade the rule, which was intended to promote the speedy administration of justice, and should therefore receive a reasonable construction to effect that purpose, by the interposition of indirectness and vague statements, when it is evidently in his power to set

forth his defense, if defense he has, with the particularity which the rule contemplates.

Chapman *vs.* Coal Co., 11 App. D. C., 386, 390:—

where the court resolved certain facts against the defendant, saying that if they were not true "it was easy for the defendant so to state, and it was incumbent for him to do so."

Bieber was president of the railway company and knew, or could have known, all the facts and circumstances. A defense that there was a failure of consideration, because the same was surrendered to or converted by the vendor, or that the requirements of the deed of trust were not complied with, is too important a matter, if made seriously and in good faith, to be covered by the bare statement, upon information and belief, that "*subsequently* to the non-payment of the first note the plaintiff took possession of the engine and the same is now in its custody."

The appellant's argument that there was a conversion is also inconsistent with his claim under III 2 (*d*) of his brief, that because the engine "proved to be only of the value of \$210 when retaken by the vendor," the \$500 cash payment made by the purchaser "would represent the full value of the engine." \$210 was the amount realized from the forced sale under the trust. While, of course, this did not prove that the engine was of that value, it shows, upon appellant's own theory of the case, that the provisions for sale under the deed of trust were complied with, and therefore there was no conversion.

Conclusion.

The attempt by counsel for appellant to distinguish the case of Osborne & Co. *vs.* Bryce, 23 Fed. Rep., 171, cited by the trial court in his opinion, is entirely unwarranted. As we have seen, from the record in this case it appears that the appellant was an accommodation endorser for the benefit of the

railway company, for there is no allegation that he was requested to endorse the notes by the plaintiff. The Osborne case presented, therefore, even stronger facts in favor of the defendant, for it was therein alleged that the defendant did not endorse or guarantee the notes "at the request of the maker, or for his benefit," but "at the request of the plaintiff" (p. 172). As to the appellant's claim that "the defendants, the endorsers of the notes in that case, were not parties to the original consideration," it was expressly alleged in defendant's answer in that case that defendant's guaranty "was made and based upon this warranty * * * and upon no other consideration, and that the guaranty would not have been given had not the plaintiff so warranted the machine sold" (p. 173). But the phrase "party to the consideration" and the argument based thereon are misleading, for there is no real consideration to an accommodation party to a note. And, assuming that there was a warranty given by the vendor and a breach of it, its performance would not have been for the benefit of the appellee, nor did the alleged breach of it cause him personally any damage.

As to appellant's appeal for "substantial justice" and slur upon "the fairness of the plaintiff's action in this case," because of the "ridiculous price" for which the engine was sold, we think it sufficient to say that no action was taken to rescind the alleged broken contract, but that the mortgage sale was caused by his and the maker's default on the first note due four months later; that he might have protected himself by bidding upon the engine at the sale; and that it does not appear that any application was made to set aside the sale upon the ground of the alleged "ridiculous price" obtained thereat.

It is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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